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Half-day discussion on indigenous languages

Forms of education of indigenous children as crimes against humanity?

Expert paper prepared for the Permanent Forum on Indigenous Issues**

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I. Introduction[1]

1. State education policies very frequently force indigenous children whose mother tongue is an indigenous language[2] into education through the medium of the dominant state language.

2. Firstly, these policies play an important role in the process of language shift. One effect is on the indigenous *languages themselves*; they are underdeveloped in more formal areas because they are not used in school. Another effect is on *attitudes*: children and parents tend to start believing that their language is worth less than the dominant language. This has a strongly negative influence on the *use* of indigenous languages. Language, culture, customs and traditions have to be lived and taught to be learned. If children are not surrounded by at least some adults and elders from their own group who (are allowed to) teach them their language, stories, customs, traditions, also in school, these will not be learned proficiently. And if the children are not proficient in their language, the likelihood of them transferring it to their own children is seriously diminished.

3. Secondly, the harmful consequences of the use of the dominant state language as the only language of instruction in schools are much more extensive. The use of the children's language has often been either overtly or covertly forbidden. Not allowing children to learn their language, or preventing them from using it through separation from grown-up proficient users, means 'prohibiting the use of the language of the group in daily intercourse or in schools' (see Section 3). This separation, most obvious when children have been removed from home and placed in residential schools, also occurs when all or most of the teachers come from the dominant group and do not speak the indigenous language. Such policies have often resulted not only in serious physical harm but also in very serious mental harm: social dislocation, psychological, cognitive, linguistic and educational harm, and, partially through this, also economic, social and political marginalization. Quoting studies and statistics from the USA, Teresa McCarty writes about the consequences of "medium-of-instruction policies" (2003: 74):

4. Indigenous and other minority students experience the lowest rates of educational attainment, the lowest family incomes, and, particularly among Indigenous youth, the highest rates of depression and teen suicides.

5. It is now clear that governments are often aware of these and other adverse effects of forcing indigenous children to be educated through the medium of the dominant language. That States persist in such policies, given such knowledge, has been described as a form of linguistic and/or cultural genocide, or, in the words of Rodolfo Stavenhagen 1990, 1995), "ethnocide". Here we consider the possibility that such policies, implemented in the full knowledge of their devastating effects,

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[1] We have omitted many examples from the present short version; for the long version, which contains the references, send an e-mail toskutnabbkangas@gmail.com. References are also available from http://www.samiskhs.no/eng/ToveSkutnabbKangas.htm.

[2] We fully endorse footnote 2 in the document of the United Nations Educational, Scientific and Cultural Organization entitled "Language, vitality and endangerment", which reads: "Throughout this document, the term *language* includes sign languages, and *speech* or *endangered language communities* also refer to sign language communities". It is important to remember that indigenous peoples also include deaf individuals and communities that use sign languages as their mother tongue.

constitute international crimes, including genocide, within the meaning of the United Nations' 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*[3] (the "Genocide Convention"), or a crime against humanity.

6. In our earlier Expert paper (Magga et al., 2004) we argued that mainly dominant-language medium education for indigenous and minority children can and does have extremely negative consequences for the achievement of goals deduced from central human rights instruments and especially for the right to education. Using the interpretations of former United Nations Special Rapporteur on the Right to Education, Katarina Tomaševski's, we showed that this dominant-language medium education prevents access to education, because of the linguistic, pedagogical and psychological barriers it creates. Without binding educational linguistic human rights, especially a right to mainly mother tongue-medium (MTM) education in state schools, with good teaching of a dominant language as a second language, given by competent bilingual teachers, most indigenous peoples and minorities have to accept *subtractive* education where they learn a dominant language *at the cost of the mother tongue* which is displaced, and later often replaced by the dominant language. Children undergoing subtractive education, or at least *their* children, are effectively transferred to the dominant group linguistically and culturally. At a community level, this often leads to their own languages first becoming endangered, when the intergenerational transfer from parent generation to the children's generation is interrupted; later it may lead to the extinction of indigenous languages. This contributes to the disappearance of the world's linguistic diversity. The shift is not, we argued, voluntary, if alternatives do not exist and if parents do not have enough solid research-based knowledge about the long-term consequences of their "choices".

7. Research conclusions about results of present-day indigenous and minority education show that the length of mother tongue medium education is more important than any other factor (including socio-economic status) in predicting the educational success of bilingual students, including their competence in the dominant language (e.g. Thomas & Collier 2002). Today's indigenous and minority education is organized contrary to solid research evidence about how best to reach high levels of bilingualism or multilingualism and how to enable these children to achieve academically in school. Dominant-language medium education for indigenous children often curtails the development of the children's capabilities, perpetuates poverty, and causes serious mental harm.

8. In this paper, we explore the extent to which the deliberate pursuit of such policies can and should be considered to be criminal, within the categories currently provided in international law.

[3] E793, 1948; 78 U.N.T.S. 277, entered into force Jan. 12, 1951; for the full text, see http://www1.umn.edu/humanrts/instree/x1cppcg.htm.

II. The nature and effects of dominant language-medium education - sociological and educational insights

A. The importance of language

9. We start with quotes containing examples of how indigenous peoples and minorities have themselves understood the "destruction" of their languages, cultures and identities, and of them as peoples, and the relationship between physical and linguistic/cultural destruction.

Example 1

10. *'Our language is dying, that is the first sign of deterioration. Our native style of life has to be based on four elements - heritage, culture, values, language - and if you take one away it begins to break down. Then we have the symptoms of this breakdown, alcoholism and abuse' (Randy Councillor, Ojibway, director of a detoxification centre in Ontario, Canada, himself an earlier 'street-drunk', in Richardson 1993: 25. "The voice of the land is in our language'" (National First Nations Elders/Language Gathering, Mi'gmaq Nation, Canada).*

11. Before embarking on the legal argumentation, we present ways of using force in subtractive education, and some negative educational and sociological consequences of it. Subtractive education—teaching (some of) the dominant language at the cost of the mother tongue and thus subtracting from the children's linguistic competence[4] — is assimilationist (see Skutnabb-Kangas, 2000). It may often directly inflict or cause physical harm and does inflict serious mental harm and very serious psychological, linguistic, cognitive, educational, social (including health-related) and economic damage. Such damage can be permanent: the consequences of most of these types of damage may follow indigenous peoples throughout their lives.

B. Force as means in indigenous education: "sticks", "carrots" and ideas

12. From a sociological – educational point of view, we use peace researcher Johan Galtung's (1980) differentiation between three forms of force: power-holders can use "sticks", "carrots" or "ideas" to accomplish the same goal.

13. Taking children away from the parents with the use of physical force, physically punishing them, or depriving them of food because they have used their own language are examples of the use of "sticks".

14. "Carrots" were used when teachers in Norway could from 1851 up to the 1920s "get a supplement to their salary if they could document good results in linguistic Norwegianisation of Saami and Kven children; likewise poor parents and children could get grants for food and clothing for showing 'positive attitudes', i.e. learning and using Norwegian, at the cost of their own languages (Eriksen & Niemi 1981: 48, 53). *Positive reinforcement of the dominant language* ('carrots') was used

[4] Instead, children should have additive education where they learn their mother tongues well, in addition to learning a dominant language (and other languages) well too.

simultaneously with *negative reinforcement of the mother tongue*" (Skutnabb-Kangas & Phillipson 1989: 31).

Example 2

15. *In the Saami and Finnish speaking areas in Norway, radio licences were cheaper than in the rest of Norway. The programmes were of course in Norwegian only. In both Norway and Sweden, books, newspapers and journals in Norwegian/Swedish were distributed free of charge in these areas while there were severe restrictions on importing books in Finnish; these were seen as unpatriotic literature. The overt prohibition of buying Finnish books was in force in Sweden until 1957 in the library of Torneå, the border city between Finland and Sweden.*

16. The use of ideas will be elaborated in Section 3.

17. The psychological separation from one's language, culture and ethnic identity and possible transfer to another language, culture and identity has often been connected with (temporal or permanent) physical separation from one's own group (i.e. "sticks"). The mandatory use by States of residential schools and similar institutions has involved the removal of indigenous children from their homes and their native communities, their transfer to institutions that were usually very far from their homes and communities - and in some cases, to families of the dominant community.

Example 3

18. *Both in the USA and in Canada it was clear that many of the schools were much further away than they needed to be. The explanation often was that they were mission schools, and 'we were sent to Moose Factory in Ontario because we were Anglicans, and the Anglicans had residences for Indian kids only from Ontario to B.B.' (Buckley Petawabano, a Cree man from Mistissini reserve in northern Quebec, quoted in Richardson 1993: 107). Thus, first indigenous peoples were forced to accept the divisions within Christianity which meant nothing to them (they were made 'Anglicans'), and then they were punished for it. Sometimes the children were flown thousands of miles away.*

19. Children in submersion education were often allowed to return physically to their communities, both at school break times and upon the completion of such education. But there are many examples of the return being conditional and the state representatives trying to prevent it, sometimes permanently. The wish to remove children from the influence of the parents is by no means over – we have many present-day examples.

C. Educational, social, physical and psychological consequences of submersion education

20. The use of physical separation and other assimilationist "sticks" can and do have very harmful psychological, cognitive, linguistic and educational effects and lead to a destruction of the group's language and culture. Here we mention examples of (1) negative educational consequences of subtractive education, in terms of achievement and outcomes; these were discussed in depth in our

first Expert paper. Then we present examples of (2) negative socio-economic and other social consequences (e.g. higher levels of unemployment, lower incomes, economic and social marginalisation, alienation, mental illness). Next come (3) negative physical consequences which can flow from (2), including alcoholism, incest, suicide, violent death rates, and so forth. We also exemplify (4) negative psychological consequences, with particular reference to the devastation caused by residential schools. Many children also lose their language during and because of the educational process, completely or partially, both in residential schools but also in day schools, sometimes even in one generation.

Example 4

21. *"For nearly a hundred years the policy of the United States government was to acculturate the Navajo, so that the Navajo could be assimilated into the White society. To effect this assimilation Navajo children were taken from the shelter of the family and sent to boarding school. Almost every child who entered the boarding school spoke only Navajo, and most of the people employed at the boarding schools spoke only English. When a Navajo child spoke the language of his family at school, he was punished" (Platero 1975: 57).*

22. There are thousands of similar examples from all over the world. The question is NOT whether children are in residential schools or not. The main issue is to what extent the goal of the school is to enable the children to add to their linguistic repertoire instead of subtracting from it, to become high-level bilingual, with maintenance and thorough development of their own language as a self-evident goal, but adding a high competence in the dominant language too. Instead, assimilationist subtractive education has been and is still the most common way of educating both hearing and deaf indigenous and minority children. Even in transitional day school programmes, especially transitional early-exit programmes, where the children start with their own language as the teaching language but are transferred to dominant language medium teaching as soon as they have some spoken command of that language, their competence in the mother tongue remains in most cases extremely poor. Thus they cannot use it in their home as adults or transfer it to their own children. The linguistic assimilation caused by education means that the children or grandchildren of these victims do not learn the mother tongue. They have thus been forcibly transferred to another group linguistically.

23. In addition to establishing that indigenous children who have been subject to subtractive dominant language medium education, particularly in residential schools, have been caused serious educational and other mental harm, it must also be established that such mental harm is the result of the education they have received. This may not always be easy to establish because Indigenous children often suffer a wide range of very negative treatments, both inside and outside the school. Still, there is a strong consensus in educational, linguistic, psychological and sociological studies that this is the case. Schooling, in addition to migration, is explored as one of the important causal factors in language loss in many of the articles in Maffi, ed. (2001).

24. Tsui and Tollefson conclude the following in their 2004 edited book *Medium of Instruction Policies*, on the basis of worldwide studies: the use of a foreign language as the medium of instruction for children who are still struggling with basic expression in that language hampers not only their

academic achievement and cognitive growth, but also their self-perception, self-esteem, emotional security, and their ability to participate meaningfully in the educational process (2004: 17).

25. It is very clear from many studies that the length of mother tongue medium education is more important than any other factor in predicting the educational success of bilingual students. It is also much more important than socio-economic status, something extremely vital in relation to dominated/ oppressed Indigenous and minority students. The worst educational results are even today with students in regular submersion programmes where the students' mother tongues (L1s) are either not supported at all or where they only had some mother-tongue-as-a-subject instruction. Dominant-language-only submersion programmes "are widely attested as the least effective educationally for minority language students" (May & Hill 2003: 14, study commissioned by the Māori Section of the Aotearoa/New Zealand Ministry of Education[5]). Thomas & Collier (2002:7) state in the conclusions of their massive study of various forms of Spanish-English bilingual education (some 210,000 students) that "the strongest predictor of L2 student achievement is the amount of formal L1 schooling. The more L1 grade-level schooling, the higher L2 achievement". Thus it is clear that submersion education is the most important causal factor in indigenous students educational failure.

26. Most statistics about indigenous peoples show that they are socio-economically marginalised. Even if the marginalisation is a result of multiple historical, geographic, social, political, cultural, linguistic and educational factors, in most cases connected to earlier or present colonisation, today formal education and especially subtractive education, the use of a dominant non-indigenous language as the teaching language (together with non-indigenous curricula and teaching methods) play an increasingly important role in reproducing the powerless economic and political status of indigenous peoples.

27. Examples abound from all over the world of indigenous and minority children having experienced serious physical punishment (both in residential and in day schools), lack of food, sexual abuse, and so forth - some examples will be given later. The economic marginalisation reproduced by education in its turn often results in direct physical harmful consequences in terms of health-related issues: no or lacking maternity care, high infant mortality, under-nourishment, dangerous work (e.g. mines, logging, chemicals in agriculture) or unemployment, child labour, poor housing and health care. Health and other physical effects from alcoholism, abuse of women and children in families, incest, and overrepresentation in suicide and crime statistics are also instances of serious physical harm. In several countries the education system, especially the residential schools, have been squarely shown to be a direct and important, often the main causal factor in this harm (see, e.g. Milloy 1999, Richardson 1993, for Canada, Churchill 1997, Crawford 1995, 1996, Costo & Costo (eds) 1987, Cahn & Hearne 1969, McCarty (ed) 2005, for the USA, Amery 1998, Jordan 1986, Fesl 1993 for Australia, Bryld 1998, for Greenland, Lind Meløy 1980, Eriksen & Niemi 1981 for Norway, Lundemark 1980 for Sweden).

28. Often education has caused both physical and mental harm. It is often difficult to judge which one has been more traumatising. Residential schools have been "arguably, the most damaging of the many

[5] http://www.minedu.govt.nz/.

elements of Canada's colonization of this land's original peoples and, as their consequences still affect the lives of Aboriginal people today, they remain so" (Milloy, 1999: xiv). Deirdre Jordan (1988: 190) who compared the impact of formal education on identity among the Australian Aboriginal peoples, the Saami in Norway, and Inuits in Greenland and Canada, claims that

> *... history shows that it was not only forces springing from economic bases, and the exploitation of material resources, which, breaking the nexus of indigenous people with their land, acted to destroy their culture and substitute for a positive identity the negative traits with which indigenous people have come to be stereotyped. One of the crucial forces which has acted to destroy the identity and the culture of indigenous people has been that of schooling.*

29. Many children who have suffered such education are permanently alienated from both their native language and culture and their families and home communities.

Example 5

30. *Kee was sent to boarding school as a child where – as was the practice – he was punished for speaking Navajo. Since he was only allowed to return home during Christmas and summer, he lost contact with his family. Kee withdrew both from the White and Navajo worlds as he grew older, because he could not comfortably communicate in either language. He became one of the many thousand Navajos who were non-lingual – a man without a language. By the time he was 16, Kee was an alcoholic, uneducated and despondent – without identity. Kee's story is more the rule than the exception." (Platero 1975: 57, 58).*

31. There are countless examples from many parts of the world from the early and mid-1800s onwards and up to the mid-1900s and even longer where the intention to destroy an indigenous group as a group/a nation/a people (physically or in other ways) has earlier been *overtly* expressed. Barrington (1992: 69) writes about Māori education in Aotearoa/New Zealand before 1950 that the aim of the educational assimilation was "to lift Māori from one society to another". The Māori were prepared through education to change life-style completely, to become farmers, like the colonisers were (see Simon, ed., 1998). The same official goal was openly expressed in the Canadian residential schools where the aim was "to get rid of the Indian problem [...] Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department" (Duncan Campbell Scott before a Parliamentary Committee in 1920, quoted in Milloy 1999: 46).

32. For obvious reasons, no state or educational authority can today be expected to express *openly* an intention to "destroy" a group or even to "seriously harm" it or to "transfer its members to another group". However, the intention can be inferred in other ways, by analysing those structural and ideological factors and those practices which cause the destruction, harm or transfer. We have done this in several ways, comparing with the older more overt ways. We claim that if state school authorities continue an educational policy which uses a dominant language as the main medium of education for indigenous and minority children, when the negative results of this policy have been

known both through earlier concrete empirical feedback (as in Canada and the United States , see Example 6 below) and through solid theoretical and empirical research evidence (as they have, at least since the early 1950s; see, e.g., UNESCO 1953; see also our first Expert paper, Magga et al. 2004), this refusal to change the policies constitutes, from discourse analytical, sociolinguistic, sociological and political scientific, and educational policy analysis perspectives, strong evidence for an "intention".

Example 6

33. *In Canada, "for most of school system's life, though the truth was known to it", the Department of Indian Affairs, "after nearly a century of contrary evidence in its own files", still "maintained the fiction of care" and "contended that the schools were 'operated for the welfare and education of Indian children'"(Milloy 1999: xiii-xiv). These schools represented "a system of persistent neglect and debilitating abuse", "violent in its intention to 'kill the Indian' in the child for the sake of Christian civilization" (ibid.: xiv; xv), Finally closed down in 1986, the Department and the churches "fully aware of the fact" that the schools "unfitted many children, abused or not, for life in either Aboriginal or non-Aboriginal communities. The schools produced thousands of individuals incapable of leading healthy lives or contributing positively to their communities" (ibid.: xvii).*

III. Genocide

34. We have shown that education through the medium of the dominant language for indigenous children has extremely harmful consequences for them. We have also shown that such education tends to be highly assimilative; this has contributed significantly to the destruction of indigenous languages and cultures.

35. This destruction has frequently been referred to as cultural genocide. Rafael Lemkin, who conceived of the term genocide, was of the view that it should encompass not only the physical destruction of what he termed "national groups", but also "the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves", and he made reference to the "disintegration of the political and social institutions of *culture*, *language*, national feelings, religion and the economic existence of national groups" (Lemkin, 1944: 79; emphasis added). The concept of cultural genocide was considered at length during the drafting of the Genocide Convention. Indeed, in the initial draft of the Division of Human Rights of the United Nations Secretariat,[6] acts of genocide (itself defined in the preamble as "the intentional destruction of a group of human beings") were divided into three categories, physical, biological, and cultural. This third category involved "destroying the specific characteristics of the group", and made further reference to the following:

a. the forcible transfer of children to another human group; or
b. the forced and systematic exile of individuals representing the culture of a group; or
c. the prohibition on the use of the national language even in private intercourse; or

[6] UN Doc. E/447.

d. the systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
e. the systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.[7]

36. The concept of cultural genocide was also included in the draft prepared by the *ad hoc* drafting committee created by the UN Economic and Social Council. The Draft Article III provided that genocide also meant any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as:

a. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
b. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[8]

37. Ultimately, however, the concept of cultural genocide was not included in the Genocide Convention, in large part due to opposition from several western States. Among the justifications for this opposition were that the physical destruction of groups was more serious that the destruction of their culture, that cultural genocide could result in "spurious claims" being brought, and that the inclusion of cultural genocide could inhibit the assimilation of cultural or linguistic groups. Ironically, delegates from some countries, including the United States and Canada, were also apparently concerned that the inclusion of cultural genocide could lead to claims by indigenous groups (Sautman, 2003: 183).[9]

38. As we shall see, the exclusion of cultural genocide from the final text of the Genocide Convention has greatly restricted the application of that treaty to the sorts of policies and practices described in the previous part of this paper. However, a closer look at the Genocide Convention is nonetheless merited. International law has developed in important ways since the conclusion of the Genocide Convention in the late 1940s, particularly in respect of the protection of minorities, to the point where policies of assimilation are now at odds with relevant international standards;[10] while these recent standards prohibit such policies, they do not, however, criminalise them. The Genocide Convention is itself a living instrument, and its interpretation and application may yet develop.

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[7] UN Doc. E/447.

[8] UN Doc. E/AC.25/12.

[9] Some parties to the deliberations on the Genocide Convention felt that the appropriate way in which to deal with policies which aim at the destruction of cultures and languages was through the development of standards of minority protection, rather than through the Genocide Convention; for a discussion of the failure of the United Nations to deal with such destruction at all, see Morsink, 1999.

[10] See, for example, Article 27 of the *International Covenant on Civil and Political Rights*, or the 1992 United Nations General Assembly *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Resolution 47/135, 18 December, 1992 (available at: http://www.unhchr.ch/html/menu3/b/d_minori.htm). At the regional level, the unacceptability of policies aimed at assimilation of minorities against their will is explicit: see Article 5, para. 2, the Council of Europe's *Framework Convention for the Protection of National Minorities* (http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CM=1&DF=2/17/2007&CL=ENG).

39. Article II of the Genocide Convention defines genocide to mean the commission of any of the acts set out in paragraphs (a) to (e) of the article—the list is meant to be exhaustive—with the intention "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Although indigeneity is not specifically referred to, there can be little doubt that indigenous peoples would not be considered to be a protected group, for example on the basis of their different ethnicity, at very least. Not surprisingly, given the evolution of the convention as just outlined, most of the acts set out in paragraphs (a) to (e) concern the physical destruction of covered groups—killing of members of the group (a), causing serious bodily harm to members of the group (b), deliberately inflicting on the group conditions of life calculated to bring about its destruction (c)—or their biological destruction—imposing measures intended to prevent births within the group (d). However, there are two provisions in paragraphs (a) to (e) which fit less easily into this schema.

40. First, paragraph (b) of Article II refers not only to causing serious bodily harm to members of the group, but also to causing serious *mental* harm to them.[11] Second, paragraph (e) refers to "forcibly transferring children of the group to another group". This latter provision is particularly interesting, as it was one of the acts which constituted cultural genocide in the initial draft of the Secretariat working group, described above, and did not form part of the definitions of physical or biological genocide that had been developed during the preparation of the convention. It has been noted that paragraph (e) was added to the Genocide Convention "almost as an afterthought, with little substantive debate or consideration" (Schabas 2000: 175). Likewise, the inclusion of the concept of "mental harm" under paragraph (b) was a late addition to the convention, and although it attracted more debate—and initial opposition by some States—its meaning and consequences also did not receive a great deal of attention (Schabas, 2000: 159-60).

41. With regard to Article II, paragraph (b), what constitutes causing "serious bodily or mental harm" is not altogether clear. Rape or other acts of sexual violence would appear to be covered; interestingly, it seems that the level of harm required, though high, need not be permanent.[12] There is now considerable evidence of the widespread physical brutality and acts of sexual abuse that were and are regularly inflicted in residential schools[13]—some of this evidence is presented in the first part of this paper—and if "serious bodily or mental harm" includes rape and other acts of sexual violence, there would be a strong argument that the experiences of many indigenous children in residential schools would be covered. As noted in the first part of this paper, residential schooling and other forms of subtractive education suffered by indigenous children also have had a range of longer-term physical consequences. It is less clear, however, that these effects would be covered by paragraph (b); rape and sexual violence—and the physical brutality used in residential schools—have both immediate and direct as well as longer-term effects, and the absence of immediate physical effects may be an important limitation on the applicability of the concept of "bodily harm".

42. We have also seen that residential schooling and other forms of subtractive education have very serious mental consequences, and it would be difficult not to classify such consequences as "mental

[11] "Causing serious bodily *or mental* harm to members of the group" (emphasis added).

[12] See, for example, *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T0, Judgment 2 September, 1998, para. 731, 501.

[13] It should be noted that, while such physical abuse are most obvious in the residential school experience, widespread physical abuse of this nature are often also present in other forms of education to which indigenous children are subjected.

harm"; indeed, as was noted in the first part of this paper, such harm does, in fact, tend to be of a permanent nature, and while, as also just noted, it is not necessary for harm to be permanent in order for it to be prohibited under paragraph (b), where such harm is permanent, this should surely strengthen the claim that it is "serious". Unfortunately, the scope of "serious mental harm" is still unclear in international law, and remains problematic (Schabas, 2000: 161). The paragraph contemplates that mental harm can exist independently of physical harm—"serious physical *or* mental harm"—and it must therefore be possible that the infliction of serious mental harm in the absence of physical harm can, potentially, constitute an act of genocide within Article II. The difficulty is that acts which have been considered to come within paragraph (b) by tribunals such as rape and sexual violence have a clear physical *as well as* mental element. Presumably, the mental trauma inflicted by a particular act must have effects that are akin to the mental trauma attendant upon rape. While it is difficult to compare different forms of extreme abuse, and without suggesting any moral equivalency between rape/sexual violence and other forms of extreme cruelty, it is clear from the sort of material presented in the first part of this paper that subtractive education, and particularly residential schooling, can have very serious and, indeed, permanent serious negative consequences for the mental health of those who have suffered them. There are therefore, in our view, strong arguments to support the contention that such education can constitute "serious mental harm".

43. The precise scope of paragraph (e) of Article II and the nature of the acts it covers are even less clear than in respect of paragraph (b). With respect to the word "transfer", for example, does the transfer have to be physical, in the sense that it involves the actual removal of children from one group and their provision to another, or would the social and cultural alienation of children from their group of origin, even if they continue to reside amongst that group, be sufficient? In order to be covered, must the transfer be permanent—the children leave the group of origin, with the intention that they never return—or is a temporary transfer for a period of time—enough to acculturate the children into another group (usually, the majority) sufficient? In many cases, residential schooling has not resulted in the permanent physical removal of indigenous children from their group of origin, although as is clear from the sort of evidence related in the first part of this article, even where children who have undergone such schooling have *physically* returned to their home communities, there is often a permanent psychic break and alienation from the culture, language and even from the family. Such education is profoundly destructive of all such links. However, what is significant is that residential schooling has often in fact resulted in a permanent physical break from the home community as well—the very sort of complete break that even the most restrictive interpretation of the paragraph might contemplate.[14]

44. Also unclear in paragraph (e) is the meaning of the concept of "*forcible* transfer" of children. Certainly, the use of physical force would surely constitute "forcible transfer", but what about less coercive means? It has, for example, been suggested that "*forcible* transfer" may include, but is not necessarily restricted to, threats or intimidation (Schabas, 2000: 177, quoting the discussion paper of the co-ordinator, the Preparatory Commission for the International Criminal Court). It is at least arguable that residential schooling can constitute "forcibly transferring children of the group to

[14] For example, when children are subsequently put in the care of non-indigenous families, or when children never return to their families and home communities.

another group" (See, for example, The Australian Human Rights and Equal Opportunities Commission, 1997: 270-5). It is certainly the case that, as noted above, children have been physically forced to leave their homes for residential schools. However, given the overwhelming coercive power of the State that is implicit in the process of residential schooling, the actual direct use of physical force is unnecessary. This is particularly the case where the practices are so well-established that indigenous parents are resigned to the inevitability of the process. This is an example of Galtung's (1980) third form of force, use of ideas. The three processes involved (see Skutnabb-Kangas 2000) when ideas are used to force a subordinated group to accept and even contribute to the reinforcement of their subordinate position are *glorification of the dominant group*, its language, culture, norms, traditions, institutions, level of development and observance of human rights, *stigmatization and devaluation the minorities/subordinated groups*, their languages, cultures, norms, traditions, institutions, level of development, observance of human rights etc so that they are seen as traditional, backward, not able to adapt to a postmodern technological information society, and, thirdly, *rationalization of the relationship between the groups* economically, politically, psychologically, educationally, sociologically, linguistically, so that what the dominant group/s do/es always seems functional, and beneficial to the minorities/subordinated groups (the majority is "helping", "giving aid", "civilizing", "modernizing", "teaching democracy", "granting rights" and "protecting world peace. Such resignation and apparent "acceptance" of the practice, though, is always due to the huge inequality of power relationships, and often an experience of the implicit but overwhelming force of the State (Example 7).

Example 7

45. *Children (and parents) had structurally few chances of escape. In Canada compulsory attendance of all indigenous children at school was secured already in 1894, with the "added provision for 'the arrest and conveyance to school and detention there' of any children who might be prevented from attending by their parents or guardians (who, in such a case, would be liable to imprisonment)" (Richardson 1993: 101). A combination of threats and carrots was often used: 'Indian Affairs used to threaten people that if they didn't send their kids to school, they wouldn't get any welfare' (Richardson 1993: 107).*

46. This type of "manufactured consent" (Herman & Chomsky 1988) has been discussed by the French sociologist Pierre Bourdieu explicitly in relation to education, where parents internalise the inevitable and thus in many cases "accept" the legitimation for it. In addition, many parents (and children) are afraid of the force (physical, economic, political) that they know state representatives are able to use if the parents (or children) refuse to obey and participate in practices which they often know are destructive. Where such means have been employed by States to ensure the attendance of indigenous children in residential schools and similar institutions, there is a strong argument that sufficient force has been used.

47. Thus, we are of the view that, in spite of the omission of the concept of cultural genocide from the Genocide Convention, many aspects of the education of indigenous children could be considered to be acts of genocide set out in Article II, based on both paragraph (b) and (e) thereof. However, in order for there to be genocide under the Genocide Convention, the acts referred to in Article II must be

accompanied by a mental element. This intent is set out in the introductory language of Article II, namely, "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". It is this aspect which presents a most serious barrier to a claim against the sorts of education described in the first part of this paper under the Genocide Convention. As noted, such forms of education can and do have the effect of destroying the languages and cultures of indigenous peoples. However, such forms of education are generally not practised in the context of the attempted physical or biological destruction of indigenous peoples.[15]

48. The most significant difficulty is that there seems to be widespread agreement that the intention to physically or biologically destroy the group is essential to any genocide claim under the Genocide Convention. This is based on the decision to exclude "cultural genocide" from the scope of the treaty. The International Law Commission has expressed the position in the terms below.

49. As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. . . . [T]he text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of 'cultural genocide' contained in the two drafts and simply listed acts which come within the category of 'physical" or 'biological' genocide.[16]

50. However, Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* provide that reference may be made to preparatory work only when the ordinary meaning of the provision, taken in context and in light of its object and purpose, render it "ambiguous or obscure". It could be argued that resort should not be had to the preparatory work, as no such ambiguity or obscurity exists. In particular, it could be argued that an understanding of the concept of "destruction" as being limited to physical destruction sits uneasily with parts of the definition of the crime in Article 2. Article 2, paragraph (b), as noted, provides that genocide means the act of causing serious bodily or mental harm with the intent to destroy the group. As already noted, serious bodily harm and serious mental harm are clearly alternatives, and therefore the causing of serious mental harm alone could potentially constitute an act of genocide. If, however, the concept of intention to destroy a group only included the intention to cause their physical destruction, it is difficult to see how the act of causing serious mental harm could ever constitute genocide, as such harm can be inflicted without the intention to cause physical destruction of the group. It is strange that a category of genocidal acts would be created that could never, by themselves, result in the commission of genocide within the meaning of the treaty.

51. Additional textual evidence is provided by paragraph (c) of Article 2, which includes among the acts of genocide that of deliberately inflicting on the group conditions of life calculated to bring about its *physical destruction*. By qualifying the concept of destruction in paragraph (c) with the word "physical", the Genocide Convention implies that the concept of "destruction" must be wider than

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[15] If they were, building of a claim that such education constitutes genocide would be significantly less difficult, although actual probative aspects of a genocide claim always present significant difficulties.

[16] Report of the Commission to the General Assembly on the Work of its Forty-First Session, UN Doc. A/CN.4/SER.A/1989/Add.1(Part 2), p. 102, para. (4).

mere physical destruction. If "destruction" was intended to be limited to physical destruction, then there would be no need to qualify the word "destruction" in this way in paragraph 2(c). Thus, the terms of article 2 of the Genocide Convention itself require that the concept of "destruction", as used in the chapeau in that article, is wider than mere physical destruction.

52. In spite of this, international tribunals continue to be wary of expanding the intent required for a finding of genocide beyond the physical or biological destruction of the group.[17] Scholarly opinion likewise generally continues to interpret the necessary intent as being limited to the physical or biological destruction of the group. Various tribunals have found that what could be described as acts of "cultural genocide" can be relevant in establishing the specific intent to physically destroy the protected group. And, of course, where the intent to destroy an indigenous people physically or biologically is established, the causing of serious mental harm under Article 2, paragraph (b), or the forcible transfer of children under paragraph (e) would amount to genocide. Establishing that intent, in conjunction with the education policies described above, would, however, in any case often be extremely difficult to do.

IV. Crimes against Humanity

53. The term 'crime against humanity' was first used in the modern context in respect of the massacres of Ottoman Turkey's Armenians from 1915. Although long associated with armed conflict, this is no longer the case; it is now accepted that they can also be perpetrated in times of peace (see Cassese, 2003: 74, Schabas, 2001: 37). The most complete description of what constitute "crimes against humanity" is now set out in the *Rome Statute of the International Criminal Court* of 17 July, 1998 (the "ICC Statute"). Article 7, paragraph 1 of the ICC Statute defines "crime against humanity" as any of a number of enumerated acts, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

54. In the Elements of Crimes which are to assist the court in the application of Article 7 and other articles, Article 7, Introduction, paragraph 3 provides that "attack directed against a civilian population" is understood to mean a course of conduct involving the multiple commission of acts enumerated in Article 7, paragraph 1, "against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". In order for there to be such a policy, the State or organization must actively promote or encourage the attack. Significantly, the acts "need not constitute a military attack".

55. The acts which can constitute a crime against humanity will be considered momentarily. However, it is certainly possible that the forms of education of indigenous children described in the first part of this paper meet the foregoing requirements. In particular, assuming for the moment that such forms of education are covered by acts set out in Article 7, paragraph 1, they are certainly committed on a multiple basis, and it would be difficult to say that, since education is generally organised by the State, they are not "in furtherance of a State policy" to commit them. The acts must be "widespread or

[17] See, for example, *Prosecutor v. Blagojević* (Case No. IT-02-60-T), Judgment of 17 January, 2005, para. 660, or *Prosecutor v. Krstić*, (Case No. IT-98-33-A), Judgment of 2 August, 2001, para. 580.

systematic", and it would again be difficult to argue that an entire system of education did not meet this description.

56. But what of the acts enumerated in Article 7, paragraph 1? Included are murder (subparagraph (a)), extermination (b), enslavement (c), torture (f), rape and various other forms of sexual violence (g), enforced disappearance of persons (i), and the crime of apartheid (j). There are two enumerated acts that are of particular relevance to this paper. The first of these is set out in subparagraph (h), the act of "persecution against any identifiable group or collectivity on . . . racial, national, ethnic, cultural, religious, . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in paragraph 1 or any crime within the jurisdiction of the court." Article 7, paragraph 2, subparagraph (g) provides that "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. The ICC Statute does not specify what are "fundamental rights"; however, a tribunal applying the concept would surely look to major international human rights instruments. In our first Expert paper (Magga et al., 2004), the nature of indigenous children's education rights, particularly in respect of mother tongue medium education, was explored, and the degree to which the forms of education described in this paper and that earlier paper amounted to a violation of such rights was elucidated. We suggest that these education rights are "fundamental rights" within the sense of the ICC Statute. As discussed above, the consequences resulting from the deprivation of these fundamental rights are severe. As also discussed above, the choice of such policies is intentional. It therefore follows that there is at least an arguable case that such State educational policies could be considered to be "persecution" within the meaning of the ICC Statute.

57. The second sort of act enumerated in Article 7, paragraph 1 of the ICC Statute that may be relevant here is that set out in subparagraph (k), effectively a catch-all provision which refers to "other inhumane acts of a similar character [to those set out in paragraph 1] intentionally causing great suffering, or serious injury to body or to *mental* or physical health". As also discussed in the first part of this paper, the sorts of education often suffered by indigenous children do indeed result in serious, often permanent injury to mental health; as noted, such education also tends to adversely affect longer-term physical health of those who have suffered it. While we are of the view that the forms of education described earlier involved a violation of fundamental rights, it is also difficult, in our view, not to conclude that the sorts of mental and physical suffering induced by such education also constitute "inhumane acts".

V. Conclusions

58. It is clear that the various forms of subtractive education to which indigenous children have been and continue to be subject results in very serious and often permanent harmful mental and physical consequences. Such forms of education are often accompanied by acts of violence which produce both immediate and long-term harmful consequences. As was discussed in our first Expert paper, such education is now at odds with and in clear violation of a range of human rights standards, and in our view amount to ongoing violations of fundamental rights. Such education is also highly

assimilationist, and as such is at odds with contemporary standards of minority protection, which standards themselves are now a fundamental part of international human rights standards.

59. In this paper, we have considered the extent to which such education can be considered to amount to genocide or crimes against humanity. In spite of the narrowing of the Genocide Convention during the process of its negotiation and conclusion, it still makes reference to acts which, we have argued, certainly describe the experience of indigenous children subjected to various forms of subtractive education. In particular, we have argued that such education can result in "serious mental harm", is often accompanied by "serious bodily harm", and can involve the forcible transfer of indigenous children to another group. Thus far, however, the interpretation of the mental element that is also necessary in order for these acts to amount to genocide has been limited to the intent to accomplish the physical or biological destruction of the group, and this has so far posed significant obstacles to a genocide claim in respect of the forms of education considered here. In our view, the concept of "crime against humanity" is less restrictive, and can also be applied to these forms of education. The precise legal content of the categories of crime that are most relevant in the context of subtractive education is still, however, unclear, making it difficult to be categorical about their application. In our view, the destructive consequences of subtractive education, not only for indigenous languages and cultures but also in terms of the lives of indigenous people/s, are now clear—indeed, they have been clear for some time. International criminal law, like all law, evolves as our understanding of the experience to which it applies develops. The concept of "crimes against humanity" provides a good basis for an evolution that will ultimately lead to the stigmatisation through law of subtractive educational practices and policies.

60. We recommend that the UN Permanent Forum on Indigenous Issues considers what action it might take on this basis.